

Practical Implications Of OSHA's Proposed Workplace Smoking Restriction (April 1994)

THE PROPOSED STANDARD

The federal Occupational Safety and Health Administration (OSHA) has proposed an indoor air quality standard that restricts smoking in "all indoor or enclosed workplaces" under OSHA jurisdiction to designated areas that meet certain criteria. Proposed 29 CFR §1910.1033(e)(1). Specifically, the designated smoking areas must be (1) enclosed, (2) exhausted directly to the outside, (3) maintained under negative pressure (with respect to surrounding spaces) sufficient to contain tobacco smoke within the designated area, (4) "non-work areas" (proposed 29 CFR §1910.1033(b)) and (5) clearly posted. The proposal further requires employers to assure that employees are not required to enter designated smoking areas in the performance of "normal work activities." Proposed 29 CFR §1910.1033(e)(1)(iv). Cleaning and maintenance work may be conducted in designated smoking areas when no one is smoking in the area. Proposed 29 CFR §1910.1033(e)(1)(iii).

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PRACTICAL IMPLICATIONS

The smoking provision in the proposed standard covers all indoor workplaces under OSHA jurisdiction. Proposed 29 CFR §1910.1033(a)(2). There are no exceptions or exclusions from this coverage. For example, the proposal would cover private residences, hotels and motels, private offices, restaurants and bars, vehicles, international airline flights, tobacco shops, and even scientific research facilities.

Private Residences:

Where an employee performs work in a private residence, the proposed standard would require the employer (*i.e.*, the homeowner or home service contractor) to restrict smoking in the home to a designated area meeting the specifications of the standard. The Occupational Safety and Health (OSH) Act defines "employee" to mean "an employee of an employer who is employed in a business of his employer which affects commerce." 29 U.S.C. §652(6). According to this definition, a maid, nanny, nurse, repair person, delivery person, or any other individual who is paid to perform work in a home is an employee protected by the OSH Act. The OSH Act defines "employer" as "a person engaged in a business affecting commerce, who has employees . . ." 29 U.S.C. §652(5). A homeowner who directly employs a maid, nanny, nurse, repair person, delivery person, etc., would be "engaged in a business affecting commerce," and would thus fit the definition of an employer covered by the OSH Act. A company that contracts with the homeowner to provide service in the home would also be an employer covered by the Act.

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The proposed standard would thus require homeowners and home service companies to ensure that there is no smoking in the home, except in designated areas meeting the criteria set forth in the standard.⁷ In effect, this would prohibit homeowners from smoking in their own homes. It is not clear from the language of the proposed standard whether such homeowners would be prohibited from smoking at any time, or just while others are working in the home. In any case, the proposed standard, as currently worded, raises the prospect of OSHA citing homeowners on a regular basis.

Hotels And Motels:

The proposed smoking restriction also covers hotels and motels. This would include private parties or meetings held in hotel conference rooms, as well as sleeping rooms in hotels and motels. Like the restriction on smoking in the home, the proposed standard is not clear on whether guests would be prohibited from smoking in hotel rooms at any time, or just while others are working in the room. In either case, the restriction is hardly necessary. Maids and maintenance personnel are nearly always the only employees who normally work in hotel rooms, and they usually perform their work while the rooms are unoccupied. It is difficult to conceive why the proposed standard prohibits smoking in sleeping rooms of hotels and motels, when the proposal permits custodial and maintenance employees to work in unoccupied smoking areas. The rulemaking record

⁷ The proposed standard offers no guidance on exactly how a home service company is to assure that a customer does not smoke in the customer's own home. Presumably, the home service company must insist that the customer not smoke in the customer's own home, despite the fact that this insistence clearly might jeopardize future business with that and other homeowners who smoke.

offers no evidence that OSHA even considered that its proposal would result in this unreasonable distinction.

Offices:

OSHA has included in its proposal the requirement that designated smoking areas be "non-work areas" and that employers assure that employees, other than custodial or maintenance employees, are not required to enter designated smoking areas in the performance of "normal work activities." By this provision, OSHA has effectively prohibited employers from designating as smoking areas, any rooms or offices where either smoking or non-smoking employees work on a regular basis. Thus, if one employee desired to make his private office or work room a designated smoking area, he would be legally prohibited from doing so, even where no other employee would ever need to enter that office or room. Under the proposed standard as it is currently written, the fact that the employee is required to perform "normal work activities" in his own office would prevent him from smoking there, even where the office meets all of the other specifications for a designated smoking area. This aspect of the proposed standard is overly broad and without rational basis.

Restaurants And Bars:

The proposed smoking restriction would cover restaurants, bars, and other food service establishments. If designated smoking areas in such establishments must not be normal work areas, as the proposed standard currently requires, then customers could not be permitted to smoke at tables or bars where waiters and bartenders normally work.

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This restriction would effectively ban smoking by patrons of restaurants and bars entirely, as well as at catered private parties, bowling alleys, etc. Such an effect would undoubtedly have a significant adverse economic impact. Apparently recognizing this, OSHA has invited "comments on feasibility considerations relative to such establishments and suggestions for alternative ways to assure that nonsmoking workers will not be exposed to tobacco smoke there." Notice of Proposed Rulemaking, p. 268 [__ Fed. Reg. ____ (April __, 1994)].

Vehicles:

The proposed standard would prohibit employees from smoking in vehicles used in the course of employment. Such vehicles, whether a company truck or an employee's personal car, are indoor workplaces and are thus covered by the smoking provisions of the proposed standard. If an employee's car is used in the course of employment, he would be prohibited from smoking in that vehicle even while alone. Like the restriction on smoking in the home and in hotel rooms, it is not clear from the language of the proposed standard whether smoking would be prohibited in such vehicles at any time, or just during company business. To prohibit an employee from smoking while alone in his own vehicle is patently unreasonable.

International Airline Flights:

Under the proposed standard, employers could not require their employees to take international airline flights because smoking is permitted on those flights. This could have a crippling effect on those businesses that depend on international markets and connections.

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Also, airlines that are employers in the United States, and are thus under OSHA jurisdiction, would be required to prohibit smoking even on international flights, or else construct designated smoking cabins that meet the proposed specifications. Since airline cabins are pressurized, it may be impossible to construct a smoking cabin that exhausts directly to the outside. Even if such designated smoking cabins were possible, flight attendants could not be required to enter those cabins to serve the passengers.

Tobacco Shops:

The proposed standard contains no exclusion for those shops engaged primarily in the sale of tobacco and tobacco-related accessories. Patrons of such shops are accustomed to sampling the various tobacco blends and products while on the premises in order to determine the blend or product that they prefer. The proposed standard would require the shops to build designated smoking areas, separate from the shops' work areas, and would prohibit the shops from requiring their employees to serve customers while the latter are smoking. Since many smokers frequent tobacco shops, rather than the other retail establishments that sell tobacco products, in order to receive personalized service, the proposed smoking restriction would all but destroy the tobacco shop business.

Scientific Research Facilities:

The proposed smoking restriction contains no exclusion for smoking that is necessary to scientific research. Under the current proposal, smoking experiments would have to be conducted in designated smoking areas, and laboratory employees could not be

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required to work in those areas. It is clear that such a restriction would unreasonably hamper scientific research on smoking.

Employer Costs:

The proposed requirement that designated smoking areas be enclosed may or may not be prohibitively costly for the employer, depending on the facility. The requirement that smoking room air be exhausted "directly to the outside," however, would likely cost most employers the expense of purchasing and installing the duct work necessary to conduct smoking room air outside, the expense of purchasing and installing fans capable of maintaining the required negative pressure, the expense of energy to operate the fans, and the expense to heat or cool intake air to replace the air exhausted from the smoking room. Whether an employer would provide a smoking room despite these costs depends on the employer's financial status and the dynamics of the employer-employee relationship. It is conceivable that some employers would not be able to, or would choose not to, incur the cost.

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